COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

BARNSTABLE, ss NO. 2017-P-1541

COMMONWEALTH,
Appellee/Plaintiff

v.

SHAWN B. LEGEYT,
Defendant/Appellant

ON APPEAL FROM A JUDGMENT OF CONVICTION
IN THE FALMOUTH DISTRICT COURT
SITTING IN BARNSTABLE COUNTY

CORRECTED BRIEF OF DEFENDANT/APPELLANT

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ISSUES PRESENTED

I. The motion judge ruled the defendant was in custody at the time he made two statements and the statements were not the product of interrogation or its functional equivalent and therefore the statements were voluntarily made and admissible. At trial the jury was to determine under the "humane practice" doctrine whether Mr. Legeyt's statements were voluntary.

Whether a new trial is required where the Commonwealth's witness testified Mr. Legeyt had received full *Miranda* warnings creating an inference he "waived his right to remain silent" when he made the second admission?

II. The defendant's pre-trial motion to sever the resisting arrest and disturbing the peace charges from the assault and battery charge was denied. Evidence of the defendant's disruptive and combative custodial conduct constituted a majority of the evidence heard by the jury on all charges. The Commonwealth's evidence of the defendant's conduct while detained contributed to the guilty finding on the

assault and battery.

Whether it was an abuse of discretion to deny severance when the evidence of the defendant's custodial and pre-arrest conduct was prejudicial where the charges were distinct and proof of one was not required for proof of the other?

STATEMENT OF THE CASE

On April 20, 2016 a complaint issued in the Falmouth District Court alleging Shawn B. Legeyt (Mr. Legeyt) violated G.L. C. 265, § 13A(b), count 1, assault and battery causing serious bodily injury (hereinafter assault and battery) on Brandon Johnson (Mr. Johnson); G.L. c. 272, § 53, count 2, disturbing the peace; G.L. c. 268, §32B, count 3, resisting arrest. (App. 53).[1] On June 20, 2016 Mr. Legeyt filed a motion to suppress statements he made to the Falmouth police department while in custody. (App. 8-9). An evidentiary hearing was held on August 12, 2016. After receiving testimony, the motion judge ordered the parties to submit written argument on whether

[1]The Appendix is delineated by the page number as appearing in the Appendix. The transcripts of motion hearings and the trial are referenced by volume number (Vol. I through V) and the page number within the volume being cited.

Miranda warnings were given, understood and waived, and the voluntariness of the statements.[2] (Vol. I, 117-118). The motion judge had determined that Mr. Legeyt was in custody. Mr. Legeyt submitted two briefs, (App. 10-27; 28-30) where in he argued that the defendant was interrogated and did not knowingly waive his right to silence. The Commonwealth argued in its brief (App. 31-45) that the officers did not question Mr. Legeyt and his statements were voluntary; as the defendant was not compelled to give his second statement, the "protections afforded by *Miranda* are not implicated." (App. 41). The Commonwealth reaffirmed its position on the issue of *Miranda* waiver by conceding it would be "unable to prove Mr. Legeyt was ever fully provided his *Miranda* warnings, that he understood them, or made a knowing and intelligent waiver." (App. 42, n.4).

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[2]The Clerk's Office was unable to locate the actual briefs filed by the parties. This counsel was able to obtain copies from the Asst. District Attorney for Barnstable County, Elizabeth Sweeney. The appendix contains the documents provided electronically to this counsel by the Barnstable District Attorney's office.

Oral argument on the issues convened on October 16, 2016. The Commonwealth maintained Mr. Legeyt was not interrogated. Mr. Legeyt maintained he was in fact interrogated. The motion judge found no interrogation. At that point the Commonwealth told the court it could not prove *Miranda* warnings were fully given as "it was "broken off halfway through." (Vol. II, 13-14). The motion judge responded "right." (Vol. II, 13-14). The motion judge ruled the second statement was voluntary and took the matter of the first statement under advisement. (Vol. II, 14-15, 22). The motion judge then heard argument on Mr. Legeyt's motion to sever the assault and battery count from the resisting arrest and disturbing the police counts; the motion was denied and the objection preserved. (App. 47-48; Vol. II, 22-23; Vol. III, 15).

In a written memorandum the motion judge ruled both statements voluntary and not the result of interrogation, therefore admissible at trial. (App. 46). Finally the motion judge determined that alcohol consumption did not factor into the voluntariness of

Mr. Legeyt's statements. (App. 46).

Mr. Legeyt's motion to dismiss the resisting arrest charge was denied. (Vol. III, 5-8). The Commowealth's motion to allow the K-9 officer, Deputy Martin, to make a first time in-court identification of Mr. Legeyt was granted. (Vol. III, 37-38, 42-65). Mr. Legeyt's motion to preclude the Commonwealth from introducing photographs of Mr. Johnson's injuries was granted in part when the trial judge limited the Commonwealth to admitting one photograph. (Vol. III, 18-21). The parties agreed that the Commonwealth could call the treating physician at Brigham and Women's Hospital to establish the seriousness of the injury. (Vol. III, 22-34, 68). Mr. Legeyt's motion to preserve objections to the denials of his motions was allowed. (App. 49-50; Vol. III, 66-67).

After the Commonwealth rested Mr. Legeyt moved for a required finding of not guilty on counts 1 and 3. Mr. Legeyt argued was he not under arrest until Officer Kinsella placed him in the cruiser and, that Mr. Johnson had a serious pre-existing injury the fight

exacerbated but did not cause. (Vol. IV, 87, 90-91). The motion was denied. (Vol. IV, 98). Mr. Legeyt did not renew his motion for required finding at the close of the evidence. (Vol. IV, 123).

The trial judge instructed the jury as to the "humane practice" doctrine as requested by Mr. Legeyt. (Vol. IV, 102-104, 106, 126, 147-148). The jury found Mr. Legeyt guilty of assault and battery (count 1) but was unable reach a verdict on resisting arrest (count 3) (Vol. V, 6-10). After discharging the jury the Commonwealth moved to *nolle prose* count 3. (Vol. V, 12-14). Count 2, disturbing the peace, was dismissed prior to trial. (App. 5, Vol. III, 69). Mr. Legeyt was sentenced to serve two and one-half years committed, with credit for 239 days held. (App. 5; Vol. V, 24). A timely notice of appeal was filed on December 19, 2016. (App. 51-52).

STATEMENT OF FACTS

The following pertinent facts are limned from the parties filings, the transcripts of the suppression hearing and subsequent argument, and the transcripts of

the trial and sentencing:

A. *Motion to Suppress*

The Commonwealth presented evidence that on April 20, 2016 police officers of the Falmouth Police Department were dispatched to 32 Bonnie Lane in the town of Falmouth. Officer Narbonne and Barnstable County Deputy Pat Martin his K-9 partner "Dex" began searching a nearby wooded area for a male described by Mr. Johnson as having short hair and wearing khakis. (Vol. I, p. 10-11). Dex picked up a scent or scents on a pair sunglasses found at the location. Shortly after entering the woods Dex alerted to a male standing behind a tree. (Vol. I, 11-13). Officer Narbonne handcuffed the male, told him he was being detained, and turned custody over to Officers Castleberry and Kotfila. (Vol. I, 13-14, 16-17). Officer Narbonne identified Mr. Legeyt as the male found in the woods. (Vol. I, 13). Officer Narbonne testified he did not detect the odor of alcohol on Mr. Legeyt's breath. Officer Narbonne assisted in getting Mr. Legeyt under control when he became erratic and combative. (Vol. I,

16-17, 20-21).

Officer Castleberry and Officer Kotfila ordered Mr. Legeyt to remain on his knees. (Vol. I, 26-27). Officer Castleberry observed Officer Kotfila and Mr. Legeyt having a casual conversation when Mr. Legeyt stated he had been "smacked by a male." (Vol. I, 27-28). Officer Castleberry told Mr. Legeyt to stop speaking so they could give him *Miranda* warnings. (Vol. I, 28, 33, 39). Officer Castleberry testified that he heard Officer Kotfila read a good portion of the rights before being interrupted but heard him finish giving warnings. (Vol. I, 30-32). Officer Castleberry opined that Mr. Legeyt was somewhere in between stone-cold sober and stumbling drunk. (Vol. I, 30, 35-38, 42-43, 46).

Officer Kotfila testified he understood that Mr. Legeyt was being detained until an investigative officer could come speak with Mr. Legeyt and he did not engage in conversation or ask any questions prior to Mr. Legeyt stating he had been smacked by a male. (Vol. I, 50-52, 60). Officer Kotfila testified he was about

half-way through the warning, including the right to remain silent and that anything he said could be used against him in a court of law, before being interrupted. (Vol. I, 53-54). Officer Kotfila testified that Mr. Legeyt remained on his knees as he finished providing *Miranda* warnings. (Vol. I, 60-61). Officer Kotfila testified he informed Mr. Legeyt he could waive his right to remain silent and that he could ask any question and make any statement he wished. (Vol. I, 56). Officer Kotfila testified he asked Mr. Legeyt if he understood the warnings Mr. Legeyt simply looked at him and did not verbally respond. (Vol. I, 56). Officer Kotfila testified he "took the look as an assent that Mr. Legeyt understood his rights." (Vol. I, 56-57, 64). Officer Kotfila formed no opinion as to whether Legeyt was intoxicated. (Vol. I, p. 59,63).

Lieutenant Kinsella (Lt. Kinsella) arrived at the location that a neighbor had indicated as where the fight occurred. (Vol. I, 7071). He saw Mr. Legeyt on his knees flanked by officers. (Vol. I, 72-73). Mr. Legeyt was speaking freely-willingly with an officer

but he could not recall any direct questions being asked of Mr. Legeyt. (Vol. I, 71-73, 74-76). Lt. Kinsella heard Officer Kotfila reading "the first few stanza's of *Miranda* warnings to Mr. Legeyt. (Vol. I, 78-79). When he heard Officer Castleberry yell "get on the ground," and saw Mr. Legeyt struggling with the officers, he ran back to assist. (Vol. I, 79-80). Lt. Kinsella used "pain compliance" and then put leg irons on Mr. Legeyt to prevent him from kicking. (Vol. I, 79-84).

Lt. Kinsella testified the officers had not questioned Mr. Legeyt about what had transpired and the only question he asked was for Mr. Legeyt's to provide his name. (Vol. I, 73-74, 75, 78, 85, 102). Lt. Kinsella testified after seating Mr. Legeyt in Officer Narbonne's cruiser Mr. Legeyt called to him to come back to the cruiser. (Vol. I, 86-87). Lt. Kinsella testified Mr. Legeyt stated "he had been in an altercation with a male party after the male party slapped him across the face." (Vol. I, 86-87, 101). Lt. Kinsella testified he did not re-*Mirandize* Mr. Legeyt

because he assumed Officer Kotfila had completed reading the warnings to Mr. Legeyt. (Vol. I, 90-91). Lt. Kinsella could not recall if an officer was seated in the cruiser. (Vol. I, 97-98). Lt. Kinsella opined Mr. Legeyt was not falling-down drunk as he was able walk and stand. (Vol. I, 88-90, 95).

B. *Trial: Commonwealth's Case-in-Chief*

Mr. Johnson explained his colostomy bag was a result of suicide attempt approximately 10 years earlier. (Vol. III,114-115). On April 20th around 3:00 a.m. Mr. Johnson was walking on Bonnie Lane, a street located in Falmouth, when a male came up behind him and spooked him. (Vol. III, 118). Mr. Johnson testified they started talking and that when he explained why he had a colostomy bag the male yelled "how can you do that to your mother" and smacked him in the face. (Vol. III, 118-119, 131-132, 133, 136). Mr. Johnson testified he told the male repeatedly he could not fight, and lifted his shirt to show the male the colostomy bag several times as he tried to get away from the male. (Vol. III, 137). Mr. Johnson testified

he had to fight the male to defend himself. (Vol. III, 137). When the fight ended Mr. Johnson found his colostomy bag was detached and he knew he had to get to a hospital. (Vol. III, 138-139). Mr. Johnson said his intestines were protruding a couple of inches and that he would become septic from E. coli if not treated. (Vol. III, 139-140, 143-144). Mr. Johnson described the male who assaulted him as a white male with a buzz haircut wearing khaki pants, dark shirt, mid-30"s. (Vol. III, 150-151). Mr. Johnson underwent surgery at Brigham and Women's Hospital in Boston. (Vol. III, 145). Mr. Johnson testified an officer showed him a photo array while he was in the hospital but he could not pick out the male who assaulted him. (Vol. III, 153).

Deputy Martin was qualified to testify as to his training with his K-9 "Dex." (Vol. III, 70). Deputy Martin provided Dex with the scent on a pair of Mr. Johnson's sunglasses. (Vol. III, 173-174). Dex entered the wooded area and alerted to a white male wearing the clothing described by Mr. Johnson. (Vol.

III, 174-175, 180). Deputy Martin stated that Officer Narbonne handcuffed the male, told him he was being detained for an investigation, and escorted him out of the woods. (Vol. III, 176-177, 184-185). Deputy Martin identified the defendant in court as the male Dex altered to in the woods. (Vol. III, 176).

Officer Narbonne testified the male became combative and had to be subdued before being placed in his cruiser. (Vol. III, 186). Officer Narbonne did not smell any alcohol on Mr. Legeyt's breath. (Vol. III, 192). Officer Castleberry testified he did not hear Officer Kotfila ask Mr. Legeyt any questions before Mr. Legeyt spontaneously started talking about the case. (Vol. III, 196-197, 204). Officer Castleberry immediately told Officer Kotfila to read Mr. Legeyt *Miranda* warnings. (Vol. III, 196). He testified that Officer Kotfila got about 75 to 80% through the rights before being interrupted by loud bystanders. (Vol. III, 197-198, 204-205). Officer Castleberry reported that Mr. Legeyt became combative and yelled "F... you" and it took four officers to gain control over Mr. Legeyt.

(Vol. III, 198-200).

Officer Kotfila testified Mr. Legeyt volunteered, without being asked any questions, that he had been "smacked in the face by another male." (Vol. Vol. I, 210). Officer Kotfila testified he started to read Mr. Legeyt *Miranda* warnings from a card and was able to complete the warnings after an noisy interruption. (Vol. III, 210-213; Vol. IV, 16-18). Officer Kotfila testified after finishing the warnings Mr. Legeyt jumped up and it took four officers to gain full control him. (Vol. III, 212-213).

Dr. Edward Kelly from Brigham and Women's Hospital explained to the jury that a colostomy is a surgical connection of the intestine directly to the skin and that the colon is exposed through a hole in the skin . (Vol. IV,22-24). He explained that if the bag is disrupted or displaced any leakage into the abdominal cavity can cause sepsis and organ failure. (Vol IV, 25, 27-28)). Dr. Kelly testified Mr. Johnson had blood and intestinal fluid leaking into his abdominal cavity, causing a serious and dangerous life-threatening

condition. (Vol. IV, 30-31, 36).

Detective William Jaques took photographs of Mr. Johnson's injuries at Falmouth Hospital. (Vol. IV, 43-47). One photograph of Mr. Johnson was admitted as evidence over objection. (Vol. IV, 46).

Lt. Kinsella testified he was dispatched to Bonnie Lane on a report of four males fighting. (Vol. IV, 51). Lt. Kinsella overheard Officer Kotfila start to read *Miranda* warnings to Mr. Legeyt and heard Officer Castleberry yell "get down on the ground." (Vol. IV, 62, 80-82). Lt. Kinsella was only 50 to 75 feet away from the struggling officers and quickly ran back and assisted in keeping Mr. Legeyt on the ground until Officer Batchelder arrived with his Taser gun. (Vol. IV, 62). Lt. Kinsella did not know if Officer Kotfila had been able to finish giving Mr. Legeyt *Miranda* warnings. (Vol. IV, 62). Lt. Kinsella testified that as soon as Mr. Legeyt was controlled by force he was placed under arrest. (Vol. IV, 64-69). Lt. Kinsella testified he got Mr. Legeyt off the ground and walked him over to a cruiser. (Vol. I, 69). He testified that

he was walking away when Mr. Legeyt called him back and volunteered that "he had assaulted a male who had slapped him across his face." (Vol. IV, 70-71).

C. *Trial: Defendant's Case*

Mr. Legeyt presented the testimony of Detective David Massi of the Falmouth Police Department.

Det. Massi testified he prepared a photo array of males features similar to Mr. Legeyt such as height, weight, and color of eyes and hair. (Vol. IV, 111-112). Det. Massi testified that on April 22, 2015, when Mr. Johnson was still hospitalized he showed the photo array to Mr. Johnson twice; neither time did Mr. Johnson identify Mr. Legeyt as his assailant. (Vol. IV, 113). Det. Massi testified Mr. Johnson inquired as to why one of the males in the array had grass on his shirt. (Vol. IV, 114). Det. Massi testified that Mr. Johnson had been sleeping prior to being shown the photo array and appeared disoriented. (Vol. IV, 117-118).

SUMMARY OF THE ARGUMENT

I. The Commonwealth's conceded at the motion hearing "that it could not prove that Mr. Legeyt received 'full' *Miranda* warnings; could not prove Mr. Legeyt understood the warnings; and, could not prove a knowing and intelligent waiver of his rights." However, based on the motion judge's ruling of "no interrogation," *Miranda* did not apply and became a non-issue. Despite its concession, the Commonwealth admitted testimony that Mr. Legeyt had received "full" *Miranda* warnings. Mr. Legeyt did not object to this testimony.

By admitting this evidence the Commonwealth permitted the jury to believe Mr. Legeyt was fully warned and waived his right to be silent. However, this was putting before the jury false evidence. Thus, an unsupported legal claim influenced the jury's determination of voluntariness under the humane practice doctrine. It cannot be said the error did not also imbue the first statement with an aura of voluntariness. A substantial risk of a miscarriage of

justice exists and a new trial is warranted. (Pp.23-35).

II. The evidence presented at trial consisted almost entirely of testimony relevant only to the charge of resisting arrest with only minimal evidence (Mr. Legeyt's statements and identification by K-9) admitted to prove the assault and battery.

The required elements of resisting arrest are distinct from the essential elements of an assault and battery charge. The failure to sever the charges allowed the jury to consider propensity evidence, his combative conduct, to support of the assault and battery charged.

Finding a defendant guilty of resisting arrest does not require a defendant first to commit an assault and battery; finding a defendant guilty of committing an assault and battery does not require a defendant resist arrest after committing an assault and battery. The facts of the offense he was detained for were overshadowed by his conduct once detained. The

"resisting arrest" testimony, despite the jury not finding proof beyond a reasonable doubt on that charge, contributed to the jury finding guilt on the assault and battery. Denying Mr. Legeyt's motion to sever the charges was an abuse of discretion and a new trial is warranted. (Pp. 35-40)

ARGUMENT

I. The jury's verdict that Mr. Legeyt's statements were "voluntary" is tainted by the testimony of the Commonwealth's witness that Mr. Legeyt received full *Miranda* warnings when that is unsupported by the evidence and contrary to the ruling on the motion to suppress.

A. *Standard of Review*

Where the defendant did not object to the claimed error below, this Court must determine if the error created a substantial risk of a miscarriage of justice. *Commonwealth v. Lugo*, 89 Mass. App. Ct. 229, 233 (2016), quoting *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999).

B. *Discussion*

A defendant seeking suppression of statements has the initial burden of proving that a contested

statement is the product of custodial interrogation by the government or its functional equivalent. *Commonwealth v. Hilton*, 443 Mass. 597, 609 (2005). The motion judge, after an evidentiary hearing, ruled Mr. Legeyt was in custody at the time of the statements. However Mr. Legeyt failed to prove to the motion judge his statements were the result of custodial interrogation and therefore there was no violation of *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980). See *Commonwealth v. Larkin*, 429 Mass. 426, 432 (1999). Without interrogation, the warnings in *Miranda v. Arizona*, 384 U.S. 436 (1996) do not apply. "*Miranda* warnings are only required when an individual is subject to custodial interrogation." *Commonwealth v. Carnes, Jr.*, 457 Mass. 812, 819 (2010).

Thus, as the case went to trial, voluntariness of the statements, without consideration of whether the statements were voluntarily made as a "waiver" of the right to be silent under *Miranda,* was a live issue that would be decided by the jury under the "humane practice doctrine." "A 'humane practice' instruction is

required where a defendant's statements are admitted into evidence and the defendant challenges the 'voluntariness' of those statements at trial.'" *Commonwealth v. Carter*, 475 Mass. 512, 523 (2016). That is: the jury is directed to disregard incriminating statements attributed to the defendant unless the Commonwealth proves beyond a reasonable doubt the defendant made the statements voluntarily. *Commonwealth v. Travares*, 385 Mass. 140, 149-150, cert. denied 457 U.S. 1137 (1982). The jury has to find the statements were the product of his own "free will and rational intellect." *Commonwealth v. Almonte,* 444 Mass. 511, 522 (2005). A statement cannot be the result of psychological coercion. *Commonwealth v. Santana*, 477 Mass. 610, 617 (2017).

The issue of voluntariness abruptly changed when Officer Kotfila testified that Mr. Legeyt had been administered full *Miranada* warnings, which alters the legal requirement of voluntariness. Putting *Miranda* voluntariness and wavier in the trial when it did not apply is both a flagrant and total disregard for the

motion judge's findings *and* an ambush carried out at trial. The Commonwealth's actions tainted the jury.

The Commonwealth conceded at the motion hearings, and the motion judge agreed, it could not prove that: (1) full warnings were provided to Mr. Legeyt before his second statement; (2) Mr. Legeyt understood the warnings and acknowledged same; and (3) his waiver was knowingly, voluntarily and intelligently made. (App. 42, n. 4; Vol. II, 13-14).

"A defendant's waiver of *Miranda* rights must be knowing, intelligent and voluntary." *Commonwealth v. Hoose,* 467 Mass. 395, 399 (2014). Similarly, due process requires that a criminal defendant's statements be voluntarily made, as a product of rational intellect and free will, and not as a result of 'inquisitorial activity' by the government such as coercion or threats." *Id.*

The Commonwealth's three clear barriers or roadblocks to proving Mr. Legeyt waived his rights when he made the second statement are addressed separately.

1. ***No Support for Admission that Full Miranda Warnings Were Provided.***

Lt. Kinsella testified that he heard Officer Kotfila begin reading *Miranda* warnings to Mr. Legeyt from a card after Mr. Legeyt had been told he was only being detained. Lt. Kinsella heard Officer Castleberry yelling "get on the ground" and he ran back to assist the officers in their effort to control Mr. Legeyt. Mr. Legeyt had risen from his knees as the interruption occurred, which was mid-way through Officer Kotfila's reading the warnings. It took four police officers to bring Mr. Legeyt under control: Mr. Legeyt was stunned by a Taser gun and placed in leg irons and then Lt. Kinsella immediately escorted Mr. Legeyt to Officer Narbonne's cruiser.

Officer Kotfila and Officer Castleberry both testified the warnings were "broken into parts": one part before the struggle, one part after. Lt. Kinsella's testimony is clear: no warnings were given after the struggle. Officer Kotfila testified he finished the warnings after the struggle. This was admitted despite the Commonwealth being aware that

Lt. Kinsella's testified he escorted Mr. Legeyt to a cruiser immediately after they gaining control. Thus, there was no proof beyond a reasonable doubt that Officer Kotfila finished providing *Miranda* warnings.

A substantial risk of a miscarriage of justice exists. It cannot be said the jury's finding the second statement voluntary does not rest on finding Mr. Legeyt had been fully warned and volunteered information as to what happened intelligently and knowingly. The issue of failure to provide full warnings was decided in *Commonwealth v. Dagraca*, 447 Mass, 546 (2006). One procedural distinction is that defendant in *Dagraca* raised at the motion to suppress that he had not been fully *Mirandized. Id.* at 547. Mr. Legeyt did so but the argument was vague. One factual difference is that the defendant in *Dagraca* was interrogated. *Id.* at 551. Mr. Legeyt could not and did not prove he was. Like Mr. Legeyt, the defendant was not at police headquarters when *Miranda* warnings were allegedly given. Thus, in both cases, there was no recording memorializing the content of the warnings.

The sergeant who provided the warnings to Dagraca testified at the motion hearing that he recited the warnings from memory; tellingly he did not include giving the warning that "anything the defendant said could be used against him." *Id.* at 551. Likewise, while Officer Kotfila said he included that precise warning before being interrupted, there was no recording (and no signed waiver) and the Commonwealth could not, and did not, prove that beyond a reasonable doubt.

This Court found the omission of that precise warning harmless beyond a reasonable doubt; the Supreme Judicial Court disagreed. *Id.* at 552. The Court cited to *Miranda v. Arizona* (warning that anything said can be used against individual *must* be given) and a host of cases in accord including *Commonwealth v. Travares*, 385 Mass. at 145, quoting *Coyote v United States*, 380 U.S. 305, 309-310 (10th Cir.), cert denied 389 U.S. 992 (1967)("if [the *Miranda]* prerequisites have not been fully met, the confession is--without more--involuntary").

2. ***No Proof That Warnings Were Understood***

"A defendant's failure to receive or understand *Miranda* warnings, or police failure to honor *Miranda* rights, does not result in suppression of a voluntary statement made in a noncustodial setting. *Commonwealth v. Weaver*, 474 Mass. 787, 799 (2016). See also *Commonwealth v. Libby*, 472 Mass. 37, 40 (2016). But Mr. Legeyt was in custody and the claim he was fully warned now required the Commonwealth to prove he understood the warnings. This it did not do.

Miranda rights are protected both under the Fifth Amendment and art. 12 of the Massachusetts Declaration of Rights." *Commonwealth v. Martin*, 444 Mass. 213, 218 (2005). It is fair to say those same procedural safeguards are implicated when the jury is told a defendant had been "fully warned" but the Commonwealth cannot prove the defendant understood the warnings. when the Commonwealth's evidence belies that claim. Officer Kotfila testified after providing [full] *Miranda* warnings he asked Mr. Legeyt if he understood what he had just told him and that Mr. Legeyt only

looked at him and he "took the look" as that Mr. Legeyt "understood."

"A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact a confession was in fact eventually obtained." *Miranda,* 384 U.S. 436, 479 (1966). The evidence supports the argument that Mr. Legeyt not only did not understand whatever warnings were given, the warnings were not fully given. That precise question could only have been asked after the struggle according to Officer Kotfila's testimony that the warning were given in "two parts", half before and half after the struggle. Officer Kotfila is contradicted by Lt. Kinsella, the senior officer at the location, who testified he put Mr. Legeyt in leg irons and walked him to a cruiser as soon as they got him under control. The Commonwealth's proof of voluntariness (that evidence that legally must include understanding warnings) must "affirmatively appear" on the record. *Commonwealth v. Mello*, 420 Mass. 373, 383 (1995). That does not obtain in the instant case.

A miscarriage of justice exists where the Commonwealth failed to prove the defendant was given and understood the warnings.

3. *No Warnings No Understanding- No Valid Waiver*

"Where full rights were not provided a defendant cannot knowingly, voluntarily and intelligently waive his rights. *Commonwealth v. Hoyt*, 461 Mass. 143, 149-154 (2011). "To be valid the waiver must be made voluntarily, knowingly and intelligently." *Commonwealth v. Edwards*, 420 Mass. 666, 670 (1995). In *Commonwealth v. Melo* 472 Mass. 278 (2015) the defendant signed a "notification" of rights form and the Court found the waiver "voluntarily, knowingly, and intentionally" made; in other words the waiver appeared on the record and the statements admissible. *Id.* at 293. "Explicit statements by the defendant that he understood his rights and waived them are not essential to a finding of a valid waiver." *Commonwealth v. Aarhus*, 387 Mass. 735, 747 (1985). Of course, that only applies when the defendant has in fact been given full warnings, a fact clearly unproven in the instant case. The Commonwealth

relied on Mr. Legeyt's admission of being in a fight. But some proof of a valid waiver must be on the record to sustain its burden of proving waiver (required when *Miranda* warnings are involved as the Commonwealth falsely claims) beyond a reasonable doubt. *Commonwealth v. Spray*, 467 Mass. 456, 467 (2014). The totality of the circumstances reveal that Mr. Legeyt was ordered to remain on his knees, "for an investigation." The content and subject matter of Mr. Legeyt's statements do not support the statements being the product of a "rational intellect." The statements reveal a confusion caused by alcohol consumption-but to a larger degree by confusion as to why he had to remain on his knees and his lack of information as to why he was being detained. For all the above reasons, the Commonwealth did not prove full warnings were given, understood and the rights waived.

4. *A Substantial Risk of a Miscarriage of Justice*

Mr. Legeyt failed to object to the complained of error. Without objection, the testimony stood. It is abundantly clear there exists a substantial risk

that the error materially changed the criteria under the "humane practice" doctrine and that change compromised the jury's verdict, causing a miscarriage of justice. See *Commonwealth v. Letkowski,* 469 Mass. 603, 617 (2014), quoting *Commonwealth v. Alphas*, 430 Mass. at 13. Without the statements the Commonwealth's case was weak as there were no eyewitnesses to corroborate Mr. Johnson's allegation; Mr. Johnson could not identify Mr. Legeyt from a photo array; the error was highly detrimental on a constitutional issue; telling the jury Mr. Legeyt was fully warned created the inference he disregarded his rights; it is highly plausible the voluntariness question may have been answered differently but for the error; and finally trial counsel's failure to object cannot be deemed tactical when he knew the Commonwealth had conceded it could not prove full warnings.

To be sure, voluntariness of a "waiver of the right to remain silent" and the "voluntariness of a statement are separate and distinct inquires. *Commonwealth v. Jackson*, 432 Mass. 82, 86 (2000). As a

result of the evidence of *Miranda* warnings, the "humane practice" doctrine, on which the jury was instructed, applied *only to the first statement*: that statement must have been voluntarily and freely made.

It cannot be said with any assurance the Commonwealth's evidence did not contribute to, or unfairly benefit the Commonwealth, for the jury found both statements were voluntary due to the "waiver" evidence. See *Commonwealth v. Travares,* 385 Mass. at 150. A new trial is warranted.

II. The denial of the motion to sever the resisting arrest charge from the assault and battery injury was an abuse of discretion resulting in prejudice to the defendant.

A. *Standard of Review*

Claims of misjoinder are reviewed under the deferential abuse of discretion standard. *Commonwealth v. Jacobs*, 52 Mass. App. Ct. 38, 41 (2001). The defendant bears the burden of demonstrating that the offenses were unrelated, and that prejudice from joinder was so compelling that it prevented him from obtaining a fair trial. *Commonwealth v. Gaynor*, 443 Mass. 245, 260 (2005).

B. *Discussion*

The Commonwealth entered a *nolle prosequi* on the resisting arrest charge after the jury could not reach a unanimous verdict. However, that resolution does not negate or foreclose an argument that the denial of motion to sever, argued twice pre-trial, caused prejudice resulting in an unfair trial. Resisting arrest is categorically unrelated in nature and degree from an assault and battery. Even if minimally connected, joinder was prejudicial and/or not in the best interest of justice. See Mass. R. Crim. P 9(a)(1) and (d), and Mass. R. Crim. P. 9(a)(3) which requires separate trials. *Commonwealth v. Pillia*, 445 Mass. 175, 179 (2005).

The Unrelated Charges and Prejudice

Mr. Legeyt moved to sever the charges after the evidentiary hearing, and prior to the commencement of the trial, to no avail. This is prejudicial clear error and an abuse of discretion. The resisting arrest charge is factually distinct from and unrelated to the assault and battery. The Commonwealth did not produce

evidence of a common scheme or pattern of operation that tended to prove the separate charges lodged in one complaint. See *Commonwealth v. Feijoo*, 419 Mass. 486, 494-495 (1995). The record supports Mr. Legeyt's claim that a bulk of testimony at trial, indeed almost all of the testimony, consisted of facts of Mr. Legeyt's conduct related by officers who arrived on the scene after the injury to Mr. Johnson. That testimony, other than a brief interaction with Mr. Johnson, consisted of almost entirely of proof of Mr. Legeyt's conduct while in custody for questioning. The offenses do not involve the same victim. *Commonwealth v. Delaney*, 425 Mass. 587, 594 (1997)(209A violations, stalking and intimidation of witness all involve same victim). Mr. Legeyt's disruptive conduct during the custodial detention is a different offense with different facts and different elements and no named victim and is significantly divorced from and unconnected to a fight between civilians.

The failure to sever the charges permitted the Commonwealth to prejudicially intertwine Mr. Legeyt's

conduct when in custody (after the assault and battery had ended) to prove he committed assault and battery. The prejudice is patently clear when considering there were no testimony from an eyewitnesses to the fight, and most compelling, Mr. Johnson could not identify Mr. Legeyt as the male out of a photo array of six males that Det. Massi presented. Indeed, in-court identification of Mr. Legeyt was admitted through Deputy Martin who relied on his K-9 Dex for identification of Mr. Legeyt.

"Joinder may promote economy in the trial of criminal offenses, particularly when the same witnesses will testify concerning one or more offense. While Mr. Legeyt concedes the officers who would be called to testify to having observed Mr. Johnson's injuries and taken Mr. Johnson's statements for a trial on the assault and battery charge would be the same witnesses to testify at a trial on the resisting arrest charge. But that is the only similarity: witnesses testifying to separate charges. This is not a case of "essentially one transaction" that could be proved by

"substantially the same evidence." *Commonwealth v. Helfant*, 398 Mass. 214, 230 (1986). Here, the assault and battery charge would not be "incomprehensible" without the resisting arrest. In *Helfant,* the Court held the rape charge would be incomprehensible with the drugging charge; the drugging for sex charge would be incomprehensible without the rape charge. *Id.* Not so with the charges lodged against Mr. Legeyt.

One can commit assault and battery without resisting arrest; conversely, one can resist arrest for hundreds upon hundred of offenses. Under the discrete facts of this case, the failure to sever the charges unfairly prejudiced Mr. Legeyt: to try the resisting arrest charge with the assault and battery charge introduced impermissible propensity evidence. *Commonwealth v. Hoppin*, 387 Mass. 25, 32-33 (1982).

The first instance that Mr. Legeyt raised the issue of the necessity to sever the charges was immediately after the close of the hearing on the motion to suppress. The testimony at the hearing clearly established Mr. Legeyt "resisted custody" (not

a crime) as he was not arrested until placed in the cruiser. As there was no evidence he resisted arrest the necessity to sever the charges was clear. *Commonwealth v. Moran,* 387 Mass. 644, 659-660 (1982). A new trial on the assault and battery is warranted.

CONCLUSION

The introduction of evidence that the defendant was provided full *Miranda* warnings, contrary to a final judgment on that issue, created a substantial risk of a miscarriage of justice where it cannot be said beyond a reasonable doubt the jury did not determine the defendant's statements were voluntary on finding the defendant waived his right to remain silent.

The denial of the motion to sever was an abuse of discretion when the charges are distinctly different and evidence establishing one is not probative of evidence establishing the other. The failure to sever the charges impermissibly allowed propensity evidence to influence the jury's verdict on the assault and battery charge. Mr. Legeyt prays this Court grant his request for a new trial.

Respectfully submitted
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CERTIFICATE OF SERVICE

I, Darla J. Mondou, hereby certify that I filed the forgoing Blue Brief with the Clerk of the Appeals Court using the Appeals Court Tyler Host efile system on March 5, 2018. The Commonwealth will be served electronically on:

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A copy will be mailed to:
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CERTIFICATE OF COMPLIANCE WITH MASS. R.

App. P. 16, 18, 20

I, Darla J. Mondou, certify that the above Blue Brief and Addendum complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Darla J. Mondou

March 5, 2018